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Constitutional Law - When Coerced Statements Lead to More Evidence: The Poisonous Tree Blooms again in the Fifth Amendment

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CONSTITUTIONAL LAW—WHEN COERCED STATEMENTS LEAD TO MORE EVIDENCE: THE "POISONOUS TREE" BLOOMS AGAIN IN THE FIFTH AMENDMENT

I. INTRODUCTION

In signing the Declaration of Independence, this country adopted the common law of England across most of the land.[1] With that common law came several implicit privileges, including *Nemo tenetur seipsum prodere* (that no one was bound to accuse himself).[2] Because the scope of the privilege was never defined, even in the United States Constitution, there were legitimate concerns regarding its scope in the New World.[3]

To protect this privilege from being undermined by police coercion, the United States Supreme Court decided *Miranda v. Arizona*.[4] *Miranda* provided several prophylactic rights separate from, but designed to protect, the rights provided by the Fifth Amendment.[5]

Dispute about the scope and ramifications of these rights in the United States Court of Appeals for the Third Circuit has focused recently on derivative evidence procured as a result of prior violations of the right against self-incrimination.[6] As a result, the Third Circuit took a bold, risky step in importing concepts from its Fourth Amendment jurisprudence

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1. *See* Constantine Athanas, Comment, *Equivocal Requests for an Attorney: Caveat Emptor Comes to the Fifth Amendment*, 45 EMORY L.J. 673, 679 (1996) (discussing adoption of English common law by majority of states of new union).

2. *See id.* (noting importation of privilege). Interestingly, it was our Puritan heritage that is most responsible for the creation of the privilege. *See id.* at 678. (noting Puritan heritage was factored into creation). English Catholics had difficulty challenging the oath *ex officio* because it was part of Canon law. *See id.* Likewise, the Protestants found the oath useful in persecuting Puritans. *See id.*

3. *See id.* at 679 (noting unclear scope of historical right). Ms. Athanas also points out that the literature of the period is probably our best guess as to the historical scope, and that, in sum, the conclusion is that no suspect was to be used to prove his or her own guilt. *See id.* at 680. The requirement excluding coerced testimony did, however, only apply to testimony coerced by the state and not testimony that was the product of social or idiosyncratic forces. *See, e.g.*, Oregon v. Elstad, 470 U.S. 298, 304-05 (1985) (noting Fifth Amendment is only concerned with state coercion); California v. Beheler, 463 U.S. 1121, 1125, & n.3 (1983) (per curiam) (same); Rhode Island v. Innis, 446 U.S. 291, 303, & n.10 (1980) (same); Oregon v. Mathiason, 429 U.S. 492, 495 (1977) (same).

4. 384 U.S. 436 (1966).

5. *See* Elstad, 470 U.S. at 306-07 (noting difference between Fifth Amendment violation and *Miranda* violation); Michigan v. Tucker, 417 U.S. 433, 444 (1974) (noting intent in *Miranda* was to protect existing rights, not to expand scope of those rights).

6. *See* United States v. Tyler, 169 F.3d 150, 155 (3d Cir. 1998) (noting issue revolves around derivative evidence procured at least in part due to earlier violations of *Miranda*), *cert. denied*, 119 S. Ct. 1480 (1999).

into its analyses of Fifth Amendment concerns.[7] The explicit addition of Fourth Amendment "fruit of the poisonous tree" analysis to *Miranda* jurisprudence was rejected earlier by the Supreme Court.[8] Nonetheless, the Third Circuit indicated that examination of the totality of the circumstances surrounding the supposed waiver requires the inclusion of the "fruit of the poisonous tree" analysis.[9]

The issue of derivative evidence following a violation of *Miranda* was an issue of first impression for the Third Circuit.[10] In order to provide a framework in which to understand the current decision, this Casebrief focuses on the history and ideology of both *Miranda* and the Fifth Amendment. Part II discusses the history of the privilege against self-incrimination, as well as *Miranda* and related cases.[11] Part III discusses the Third Circuit's analysis of custodial interrogation cases and enumerates the fundamental interests considered by the court.[12] Part IV analyzes the impact of this approach for both persons suspected of crimes and their counsel, as well as for the prosecutors who wish to strengthen their cases.[13]

II. HISTORY

Our privilege against self-incrimination is an artifact of our English heritage.[14] It should thus come as no surprise that English common law

7. *See id.* (noting that Fourth Amendment analysis should guide inquiry into Fifth Amendment question). The risk here stems from the Supreme Court's explicit disapproval of this mixture in violations of the *Miranda* decision's directives. *See Elstad*, 470 U.S. at 308-09 (rejecting use of Fourth Amendment jurisprudence in *Miranda* cases).

8. *See Elstad*, 470 U.S. at 308 (noting no "fruit of the poisonous tree" analysis for *Miranda* violations).

9. *See Tyler*, 164 F.3d at 158 (stating totality of evidence includes poisonous tree analysis). Because the *Miranda* prophylactic rules and the Fifth Amendment are conceptually distinct, the application of the poisonous tree analysis is possible. *See Elstad*, 470 U.S. at 307-08 (noting distinction between Fifth Amendment and *Miranda* rules).

10. *See Tyler*, 164 F.3d at 155 (describing case as one of first impression).

11. For a discussion of the history of the privilege against self-incrimination, the *Miranda* decision and the resulting structure of Fifth Amendment jurisprudence, see *infra* notes 14-97 and accompanying text.

12. For a discussion of the Third Circuit's analysis of Fifth Amendment interests, including the incorporation of the "fruit of the poisonous tree" doctrine, see *infra* notes 98-152 and accompanying text.

13. For a discussion of the repercussions of the Third Circuit's mode of analysis for criminal attorneys, see *infra* notes 153-59 and accompanying text.

14. *See* Brown v. Walker, 161 U.S. 591, 596-97 (1896) (establishing English origins of right against self-incrimination). In *Brown* the Court noted:

> The maxim 'Nemo tenetur seipsum accusare,' had its origin in a protest against the inquisitorial and manifestly unjust methods of interrogating accused persons, which has long obtained in the continental system, and, until the expulsion of the Stuarts from the British throne in 1688, and the erection of additional barriers for the protection of the people against the exercise of arbitrary power, was not uncommon even in England. While the admissions or confessions of the prisoner, when voluntarily and

played an important part in the initial formulation of the right.[15] An accepted corollary of this right was that a confession that was not freely given was not admissible at trial.[16] Although the standards involved bear no semblance to each other, early jurisprudence on the privilege prohibited many of the same behaviors as modern jurisprudence.[17] After its initial

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> freely made, have always ranked high in the scale of incriminating evidence, if an accused person be asked to explain his apparent connection with a crime under investigation, the ease with which the questions put to him may assume an inquisitorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner, and to entrap him into fatal contradictions, which is so painfully evident in many of the earlier state trials, notably in those of Sir Nicholas Throckmorton, and Udal, the Puritan minister, made the system so odious as to give rise to a demand for its total abolition. The change in the English criminal procedure in that particular seems to be founded upon no statute and no judicial opinion, but upon a general and silent acquiescence of the courts in a popular demand. But, however adopted, it has become firmly embedded in English, as well as in American jurisprudence. So deeply did the iniquities of the ancient system impress themselves upon the minds of the American colonists that the States, with one accord, made a denial of the right to question an accused person a part of their fundamental law, so that a maxim, which in England was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment.

Id.; *see* Athanas, *supra* note 1, at 679 (discussing origin of Fifth Amendment right against self-incrimination).

The right originated as a response to ecclesiastical courts' practice of requiring the oath *ex officio*: forcing defendants to testify in cases where the charges and evidence were secret, then questioning them until they perjured themselves, incriminated themselves or refused to answer. *See* Athenas, *supra* note 1, at 677-78 (noting origin of right). In response, Parliament banned the use of the oath as repugnant to the "law of Nature." *Id.* at 678.

In the Declaration of Independence, the states adopted the common law of England, and with it, the privilege against self-incrimination. *See id.* at 679 (noting states adoption of privilege).

15. *See generally* Athanas, *supra* note 1. The first impression of the Supreme Court on the question of voluntariness was found in *Hopt v. Utah*, 110 U.S. 574 (1884). In *Hopt*, the Court acknowledged the difficulty of defining a standard that could limit the exclusion of confessions while protecting the right against self-incrimination, but stated that if a suspect is deprived "of that freedom of will or self-control essential to make his confession voluntary within the meaning of the law," then the inculpatory statement cannot be admitted into evidence. *Id.* at 584-85.

16. *See* Athanas, *supra* note 1, at 681-82 (noting inadmissability). It was also recognized that there were multiple paths leading to involuntary confessions besides torture. *See id.* at 682. Indeed, police coercion was also contemplated; it could negate the will required to make a confession voluntary. *See id.*

17. *See* Bram v. United States, 168 U.S. 532, 549 (1897) (defining concept of voluntariness and finding coercive, non-violent police tactics rendered confession involuntary). In *Bram*, the interrogating police officer informed a murder suspect, "[Y]our position is rather an awkward one. I have had [another suspect] in this office and he made a statement that he saw you do the murder." *Id.* at 539. In the resulting discussion, the suspect incriminated himself. *See id.* The Court reasoned that "when the statement was made to him that the other suspected person had charged him with the crime, the result was to produce upon his mind the fear that if he remained silent it would be considered an admission of guilt." *Id.* at 562.

jurisprudence, however, the United States Supreme Court turned its back on the old ways and began using a Fourteenth Amendment Due Process analysis in self-incrimination cases.[18] At first, this shift in paradigms limited the scope of the privilege to cases involving physical torture.[19] The Court soon broadened its interpretation, including "torture of the mind" as well as that of the body.[20] This case-by-case due process analysis, however, provided no guidance to lower courts.[21]

Modern jurisprudence began after the incorporation of the Fifth Amendment into the Fourteenth Amendment.[22] The incorporation paved the way for *Miranda* and its resultant judicially legislated protections

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Therefore, reasoned the Court, the statement was the product of "hope or fear" and inadmissible. *Id.*

Other forms of police coercion are equally taboo. *See* Ziang Sung Wan v. United States, 266 U.S. 1, 14-17 (1924) (characterizing lengthy questioning of ill suspect as coercive). In *Ziang Sung Wan*, police interrogated a sick suspect in a hotel room where, as a result of "persistent, lengthy, and repeated cross-examination," he confessed to three murders. *Id.* at 11-13. The Court held that "the requisite of voluntariness is not satisfied by establishing merely that the confession was not induced by a promise or a threat." *Id.* at 14. Due to the length and intensity of the interrogation of the defendant while he was ill, the Court could not find that the confession was made voluntarily. *See id.* at 15.

18. *See* Athanas, *supra* note 1, at 683 (stating that Court shifted perspective to Due Process analysis). The Court had previously held that the self-incrimination clause could not be applied to the states as part of the Fourteenth Amendment's Due Process clause. *See id.*

19. *See id.* at 684 (discussing initial limitations of Due Process analysis of self-incrimination privilege violations).

20. *See* Watts v. Indiana, 338 U.S. 49, 53 (1949) ("When a suspect speaks because he is overborne, it is immaterial whether he has been subjected to a physical or a mental ordeal."); *see also* Payne v. Arkansas, 356 U.S. 560, 566 (1958) ("That petitioner was not physically tortured affords no answer to the question whether the confession was coerced. . . ."). Note, however, that these were still brutal cases. In *Payne*, for example, a "mentally dull" young African-American was interrogated in relation to a crime the day before. *See Payne*, 356 U.S. at 562 n.4, 563. He was arrested without warrant, was not brought before a magistrate to be informed of his rights as required by Indiana law, was held incommunicado for three days, was underfed and under-clothed and was finally told that the police would be hard-pressed to restrain the mob waiting outside that wanted to "get him" when he confessed. *See id.* at 562-65. While failing to feed and clothe a suspect could be deemed physical torture, the Court held that purely mental tactics could also be torturous. *See id.* at 566. It is worth noting, however, that there was some precedent that the presence of a prior confession was of such coercive nature that any subsequent confession must be a fruit of the first. *See* United States v. Bayer, 331 U.S. 532, 540 (1947) ("After an accused has once let the cat out of the bag by confessing . . . [t]he secret is out for good. In such a case, a later confession may always be looked upon as fruit of the first.").

21. *See* Athanas, *supra* note 1, at 683-86 (noting lack of guidance provided by Supreme Court). Although it is true that some inferences can be drawn from fact-based inquiries, the argument here is that a bright line rule, or even a line that is "fuzzy" does much more to illuminate lower courts. *Cf. id.* at 686 (showing due process analysis lacked bright line rule, requiring case-by-case analysis).

22. *See* Malloy v. Hogan, 378 U.S. 1, 6 (1964) (stating that American criminal system is not inquisitorial and application of Fifth Amendment to states is therefore mandated).

of Fifth Amendment principles.[23] Recall that in *Miranda*, police arrested and interrogated suspect Ernesto Miranda without making him aware that he had a right to have an attorney present at the interrogation.[24] That Miranda had signed a form with a typewritten clause claiming he had full knowledge of his legal rights was not enough to establish a knowing and intelligent waiver of those constitutional rights.[25]

The Court held that the prosecution cannot use any statements made by the defendant in its case-in-chief unless it can meet several procedural safeguards, including the famous "*Miranda* warnings."[26] The Court reminded us that a "voluntarily, knowingly and intelligently" made waiver is required before police may obtain statements to be used as evidence.[27] The Court later acknowledged that these procedural safeguards were not intended to cripple interrogation as a method of procuring evidence, but

23. *See* Oregon v. Elstad, 470 U.S. 298, 309 (1985) (noting difference between violation of *Miranda* and violation of Fifth Amendment); Michigan v. Tucker, 417 U.S. 433, 444 (1974) (stating *Miranda* protections are procedural safeguards, not constitutional rights by themselves).

24. *See* Miranda v. Arizona, 384 U.S. 436, 491 (1966) (describing arrest). Note that the right to presence of counsel at custodial interrogations was enshrined by *Escobedo v. Illinois*. *See* 378 U.S. 478 (1964) (holding refusal of request for counsel during interrogatioin violates Sixth Amendment).

25. *See Miranda*, 384 U.S. at 492 (noting that signing of form is insufficient evidence of knowing and intelligent waiver). *Cf.* Haynes v. Washington, 373 U.S. 503, 512-13 (1966) (noting that voluntariness clause contained in document alleged to be involuntary has no evidentiary value); Haley v. Ohio, 332 U.S. 596, 601 (1948) (Douglas, J., concurring) (holding boy 15 years old cannot be assumed to have knowledge necessary for knowing and intelligent waiver). Note also that, as our Sixth Amendment jurisprudence shows, the government has the burden of proving a knowing and intelligent waiver of a constitutional right. *See* Johnson v. Zerbst, 304 U.S. 458, 464 (1938) ("[C]ourts indulge every reasonable presumption against waiver of fundamental constitutional rights and . . . do not presume acquiescence in the loss of fundamental rights.") (footnotes and internal quotes omitted); *see also* Brookhart v. Janis, 384 U.S. 1, 4 (1966) (noting presumption against waiver); Glasser v. United States, 315 U.S. 60, 70 (1942) (same).

26. *See Miranda*, 384 U.S. at 444 (describing limitation placed on prosecution to protect constitutional rights). The Court limited the application of *Miranda* to custodial interrogation and defined that as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.* The warnings are not strictly required, as the Court left open the possibility of other safeguards. *See id.* The warnings themselves must inform the suspect "that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Id.*

27. *Id.* The Court also made clear that if the suspect "indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning." *Id.* at 444-45. Also, the Court admonished that there can be no questioning of an unrepresented subject who indicates "in any manner" that he does not wish to be interrogated. *Id.* at 445. Finally, the Court noted that the suspect may terminate the questioning at any time. *See id.*

rather to buttress the privilege against self-incrimination.[28] The Court also invited the states and Congress to devise an alternative solution.[29]

What exactly is interrogation within the meaning of *Miranda*? The Court had occasion to answer that question in *Rhode Island v. Innis*.[30] In *Innis*, the defendant was suspected of robbing a taxicab driver and then killing the man by firing a sawed-off shotgun into the back of his head at point-blank range.[31] The suspect, after having been read his *Miranda* rights three times, invoked his right to counsel.[32] While the suspect was being transported to the station, officers discussed between themselves the possibility that a child might stumble upon the weapon and kill herself.[33] The suspect then interrupted and led police to the weapon.[34]

In its analysis, the Court started with the definition of interrogation in *Miranda*: "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."[35] The Court noted specifically that this defini-

28. *See* Michigan v. Tucker, 417 U.S. 433, 444 (1974) (stating that intent in *Miranda* was to protect existing rights, not to expand scope of those rights). In *Tucker*, the suspect was arrested for rape after police followed his dog from the crime scene to Tucker's home. *See id.* at 435-36. Police informed Tucker that he had the right to counsel at the interrogation and that any statement he made could be used against him in the future. *See id.* at 436. Tucker was not, however, informed that an attorney would be provided to him if he could not afford one. *See id.* Tucker then made statements that led police to another witness, whose testimony incriminated Tucker. *See id.* at 436-37. The interrogation occurred before *Miranda*, but the trial after, so the Court held *Miranda* applied. *See id.* at 435. The Court compared the facts of the case with the practices sought to be abolished by *Miranda* and determined that the practices employed at the instant case bore no semblance to *Miranda*. *See id.* at 444-45. *Miranda* required only that statements made without its protective warnings not be used in the prosecution's case-in-chief. *See id.* at 445. Because the Court found no violation of Tucker's Fifth Amendment rights, the conviction stood. *See id.* at 449-50.

29. *See Miranda*, 384 U.S. at 490 (inviting legislative solution to coerced confessions). Congress did take some steps to displace *Miranda*. *See* 18 U.S.C. § 3501 (1994) (defining evidentiary requirements of confessions). The United States Supreme Court has not yet considered the constitutional implications of this statute. *See* Edward M. Hendrie, *Beyond* "Miranda", FBI LAW ENFORCEMENT BULL., Mar. 1997, at 2 (noting absence of Court review of constitutionality of § 3501). There is still some argument about the legitimacy of judge-made prophylactic rules. *See generally* David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190 (1988) (observing debate and defending *Miranda*).

30. 446 U.S. 291 (1980).

31. *See id.* at 293 (describing method of murder). The perpetrator had then buried the taxi driver in a shallow grave, where the body was discovered four days later.

32. *See id.* at 294 (showing suspect invoked his right to counsel).

33. *See id.* at 294-95 (stating officers discussed amongst themselves possibility that child might stumble upon weapon and kill herself).

34. *See id.* at 295 (noting suspect then interrupted and led police to weapon).

35. *Id.* at 298 (quoting *Miranda v. Arizona*, 384 U.S. 436, 444 (1966)) (internal quotes omitted).

tion was not limited merely to direct questioning.[36] The Court found that the "functional equivalent" of direct questioning also constituted interrogation.[37] To the extent that this standard examines behavior "reasonably likely to elicit an incriminating response from the suspect," it is specifically focused on the perceptions of the suspect, not the intentions of the police.[38] As applied to Innis, there could be no interrogation because the police were not questioning him and it was unforeseeable that Innis' conscience was particularly susceptible to the plight of special-needs children.[39]

Because it is clear that information obtained in violation of *Miranda* cannot be used in the prosecution's case-in-chief, the argument has been made that evidence obtained as a result of violations of *Miranda* should be

36. *See id.* at 298-99 (noting concerns of *Miranda* reached practices other than direct questioning). The Court noted that the concerns in *Miranda* were that the "interrogation environment" created by the effect of interrogation combined with custody would "subjugate the individual to the will of his examiner" and decimate the practicality of the privilege. *Miranda*, 384 U.S. at 457-58. The Court specifically denoted as coercive the procedure known as the "reverse line-up," where a suspect was placed in a line-up and a coached witness "identified" him as the perpetrator. *Innis*, 446 U.S. at 299. The Court also acknowledged that interrogation must be something more coercive than mere custody. *See id.* at 300.

37. *Innis*, 446 U.S. at 300-01 (concluding that Fifth Amendment definition of interrogation included direct questioning or its functional equivalent). The Court defined the functional equivalent of direct questioning as "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Id.* (footnotes omitted).

38. *Id.* at 301-02 & n.7. The Court was careful to note, however, that:

> This is not to say that the intent of the police is irrelevant, for it may well have a bearing on whether the police should have known that their words or actions were reasonably likely to evoke an incriminating response. In particular, where a police practice is designed to elicit an incriminating response from the accused, it is unlikely that the practice will not also be one which the police should have known was reasonably likely to have that effect.

Id. at n.7. This definition of interrogation was also intended to shelter the suspect from exploitation of factors of which both the police are aware and which make the suspect unusually susceptive to a particular ploy. *See id.* at n.8.

39. *See id.* at 302 (noting that police conversation did not qualify as interrogation under *Miranda*). The Court also noted that Innis was not "unusually disoriented or upset at the time of his arrest." *Id.* at 303. It would then appear that the suspect's psychological state would play into the analysis of whether the police knew a ploy was reasonably likely to induce an incriminating response.

similarly barred from admission.[40] In *Oregon v. Elstad*,[41] the Court had occasion to decide whether a failure by law enforcement to issue *Miranda* warnings, without proof that any coercion actually occurred, could taint subsequent admissions made after a recitation of the *Miranda* rights and a knowing, intelligent and voluntary waiver of those rights.[42]

In *Elstad*, the suspect was approached by police officers following identification by a burglary witness.[43] Elstad made an incriminating re-

40. *See Miranda*, 384 U.S. at 444 (banning statements made in custodial interrogations without warnings from entering as evidence in prosecution's case-in-chief). The basis for this argument is *Wong Sun v. United States*, 371 U.S. 471 (1963). In *Wong Sun*, police received a tip from an informant, who had not yet proven reliable or unreliable, that someone named "Blackie Toy" was selling heroin from a laundry. *See id.* at 473. Several illegal arrests and attendant searches later, the trail of evidence led to the arrest of Wong. *See id.* at 474-76. The evidence against Wong included some heroin found in another suspect's home and an incriminating statement. *See id.* at 475-77. Wong argued that both were the fruits of illegal arrests and searches and as such should be suppressed. *See id.* at 477. The Court held that the "exclusionary prohibition extends as well to the indirect as the direct products of [unconstitutional] invasions." *Id.* at 484 (citing *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920)). The fruits of illegal searches may consist of both the tangible products of those searches as well as utterances and other verbal evidence procured as a result of the initial constitutional violation. *See id.* at 485-86 (citing *Nueslein v. District of Columbia*, 115 F.2d 690 (1940)). The Court found that Wong's incriminating statement, being made several days after the illegal arrest and following Wong's release on his own recognizance, was sufficiently attenuated from the taint of the illegal arrest so as to be admissible against him. *See id.* at 491 (citing *Nardone v. United States*, 308 U.S. 338, 341 (1939)). The narcotics were also admissible against Wong because they were obtained without violating any of Wong's constitutional rights. *See id.* at 491-92.

The "fruit of the poisonous tree" doctrine has traditionally applied solely to violations of the Fourth Amendment. *See, e.g.*, Oregon v. Elstad, 470 U.S. 298, 305-06 (1984) (finding difference between violation of Constitution's Fourth Amendment and decision in *Miranda*); New York v. Quarles, 467 U.S. 649, 654 (1984) ("The prophylactic Miranda warnings therefore are 'not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected'" (quoting *Michigan v. Tucker*, 417 U.S. 433, 444 (1974) (editorial alteration and footnote omitted in original)). As noted by the Court in *Elstad*, "The purpose of the Fourth Amendment exclusionary rule is to deter unreasonable searches, no matter how probative their fruits." 470 U.S. at 306 (citing *Dunaway v. New York*, 442 U.S. 200, 216-17 (1979); *Brown v. Illinois*, 422 U.S. 590, 600-02 (1975)). In contrast, the Fifth Amendment prohibits the use of compelled testimony. *See Elstad*, 470 U.S. at 306-07. While there are quite different interests involved, and the Court has been loathe to extend the protective umbra of the exclusionary rule to cover violations of the *Miranda* decision, the Court has never had occasion to consider violation of the Fifth Amendment proper and whether such a violation could result in taint carrying to further evidence.

41. 470 U.S. 298 (1985).

42. *See id.* at 300 (stating issue is whether police failure to issue *Miranda* warnings without proof of coercion precludes admission of self-incriminating evidence following issuance and waiver of warnings). Note that this decision involves violation of *Miranda*, and not of the Fifth Amendment proper.

43. *See Elstad*, 410 U.S. at 300 (explaining circumstances of approach). Elstad was seen by neighbors of the burglary victim and known as a local resident. *See id.*

mark and a pre-existing warrant for his arrest was executed.[44] At the station, police read Elstad his rights and Elstad waived them to make further incriminating signed statements.[45] At trial, Elstad moved to have both the home statement and the later signed statements suppressed.[46] The Court noted that:

> The Oregon court assumed and respondent here contends that a failure to administer Miranda warnings necessarily breeds the same consequences as police infringement of a constitutional right, so that evidence uncovered following an unwarned statement must be suppressed as "fruit of the poisonous tree." We believe this view misconstrues the nature of the protections afforded by Miranda warnings and therefore misreads the consequences of police failure to supply them.[47]

The Court recalled that the Fifth Amendment is only concerned with testimonial evidence.[48] The only pressure to confess recognized by the Fifth Amendment is official coercion.[49] Thus, mere violation of the technical requirements of *Miranda* is not an error of constitutional dimensions.[50]

Police questioned Elstad in his living room before arresting him, and during this questioning Elstad admitted his presence at the burglary. *See id.*

44. *See id.* at 300-01 (describing circumstances of arrest). The warrant issued upon identification by the witness, but police did not execute it until after Elstad had made his incriminating remark. *See id.*

45. *See id.* at 301-02 (noting actions at station). The delay between the two interrogations was approximately one hour. *See id.* at 301. Elstad then admitted he was paid "a small bag of grass" to show a group of people the victims' house and how to gain entry to it. *Id.* at 301-02.

46. *See id.* at 302 (noting suppression motion).

47. *Id.* at 304. Elstad had relied on *United States v. Bayer*. *See* 331 U.S. 532, 540 (1947) (holding subsequent confessions are always fruit of initial confession). In *Bayer*, the Court remarked that:

> After an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good. In such a sense, a later confession always may be looked upon as fruit of the first.

Id. Elstad had also relied upon *Wong Sun v. United States*. *See* 371 U.S. 471, 484-85 (1963) (noting that evidence obtained as result of violation of constitutional right must be suppressed).

48. *See Elstad*, 470 U.S. at 304 (stating that Fifth Amendment is unconcerned with nontestimonial evidence and citing *Schmerber v. California*, 384 U.S. 757, 764 (1966) (holding defendant may be compelled to supply blood samples)). *Cf.* Kate Greenwood & Jeffrey A. Brown, *Custodial Interrogations*, 86 GEO. L.J. 1318, 1318 (1998) (noting that Fifth Amendment protects against compulsion and coercion).

49. *See Elstad*, 470 U.S. at 304-05 (noting Fifth Amendment concern over official coercion).

50. *See id.* at 305 (noting that violation of requirements of *Miranda* not sufficient to violate Constitution). The Court did not, however, state whether official coercion proper would be sufficient grounds for a "fruit of the poisonous tree" suppression of evidence discovered as a result of the inappropriate behavior. *See id.* at 304-05. Also note that individual state constitutions and common law may be interpreted to provide more freedom than the federal constitution. *See generally*

Because the "fruit of the poisonous tree" doctrine only applies to constitutional errors, it was inapplicable to the case at bar.[51]

A. *The* Mosley *Revolution*

Upon invocation of either the right to remain silent or the right to counsel during an interrogation, all police questioning must cease.[52] The invocation of these rights, however, must be objectively unambiguous.[53]

Katherine E. McMahon, *"Cat-Out-of-the-Bag" & "Break-in-the-Stream-of-Events": Massachusetts' Rejection of* Oregon v. Elstad *For Suppression of Warned Statements Made After a* Miranda *Violation*, 20 W. NEW ENG. L. REV. 173 (1998). Thus, Massachusetts has held that a voluntary statement obtained after technical violation of *Miranda* may be inadmissible under Massachusetts common law. *See id.* at 179. At least one commentator holds the view that this interpretation of *Miranda* as prophylactic may have induced some law enforcement officers to violate its directives intentionally. *See* Kimbery A. Crawford, *Intentional Violations of* Miranda*: A Strategy for Liability*, FBI LAW ENFORCEMENT BULL., Aug. 1997, at 5-6 (arguing that viewing of *Miranda* rights as procedural may have influenced some law enforcement officers to violate them intentionally).

51. *See Elstad*, 470 U.S. at 306-07 (holding that "fruit of the poisonous tree" doctrine does not apply to mere technical violations of prophylactic rule).

52. *See* Miranda v. Arizona, 384 U.S. 436, 473-74 (1966) (noting invocation of rights to be "scrupulously honored"). *Compare* Kordenbrock v. Scroggy, 919 F.2d 1091, 1096-97 (6th Cir. 1990) (en banc) (holding continued questioning after suspect said "I can't tell you no more tonight" violated *Miranda*); United States v. Pena, 897 F.2d 1075, 1081-82 (11th Cir. 1990) (finding violation when police fail to clarify equivocal invocation); United States v. Wallace, 848 F.2d 1464, 1475 (9th Cir. 1988) (finding 10 minutes of questioning silent defendant violative of *Miranda*), *and* Anderson v. Smith, 751 F.2d 96, 101-02 (2d Cir. 1984) (finding repeated invocations of rights under *Miranda* followed only by more police questioning violated *Miranda*), *with* Medina v. Singletary, 59 F.3d 1095, 1102-03 n.5 (11th Cir. 1995) (holding that where otherwise cooperative suspect states he does not wish to speak, followed by "let me tell you what I'm [sic] think" and statement, there is no violation), *cert. denied*, 517 U.S. 1247 (1996), *and* United States v. D'Antoni, 856 F.2d 975, 980-81 (7th Cir. 1988) (holding re-approach of silent suspect with claim of more detailed questions does not violate suspect's rights).

A good illustration is *Medina*, 59 F.3d at 1095. In *Medina*, a 21-year-old Cuban immigrant was sentenced to die for the murder of a friend. *See id.* at 1099. The interrogation proceeded in two phases: a preliminary unrecorded phase designed to organize the information and a recorded phase designed to produce coherent testimony. *See id.* at 1101. Medina was read his rights and cooperated with the preliminary phase. *See id.* at 1101-02. The recorder was then turned on and Medina was again informed of his rights. *See id.* at 1102. When asked if he wished to speak to the officers, Medina replied "No." *See id.* at n.5. Due to the response style of the suspect, the court found the officer could have interpreted the negative as either "No, I don't want to stop" or "No, I don't want to speak." *See id.* at 1102 & n.5. The officer then asked Medina to clarify that, and Medina continued with the interview. *See id.* at n.5. The court held that there was not an unambiguous assertion of the right, and therefore no violation. *See id.* at 1104.

53. *See* Davis v. United States, 512 U.S. 452, 459 (1994) (noting assertion of right must be unambiguous, or else police are under no obligation to stop interrogation). The analysis must also be an objective analysis. *See id.* "A suspect must articulate his desire to cut off questioning with sufficient clarity that a reasonable police officer in the circumstances would understand the statement to be an assertion of the right to remain silent." Coleman v. Singletary, 30 F.3d 1420, 1424 (11th

Once questioning has ceased, the police must "scrupulously honor" the invocation of the right, as required by *Michigan v. Mosley*.[54] In *Mosley*, police arrested the suspect for armed robbery and, during the resulting interrogation at the station house, Mosley stated he did not want to answer any questions about the robberies.[55] Several hours later another detective questioned Mosley about a homicide unrelated to that robbery.[56] Mosley did not immediately object to this second interrogation, and during it in-

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Cir. 1994), *cert. denied*, 514 U.S. 1086 (1995). In other words, "[t]he determination of whether a suspect's right to cut off questioning was scrupulously honored requires a case-by-case analysis." Christopher v. Florida, 824 F.2d 836, 840 (11th Cir. 1987).

The objective analysis of unambiguity may not consider behavior following the request. *See* Smith v. Illinois, 469 U.S. 91, 100 (1984) ("[A]n accused's postrequest responses to further interrogation may not be used to cast retrospective doubt on the clarity of the initial request itself.") (emphasis omitted). Behavior before the request is, however, fair game. *See id.* at 99-100 ("[A]n accused's request . . . may be characterized as ambiguous or equivocal as a result of events preceding the request or of nuances inherent in the request itself.").

54. 423 U.S. 96, 102-03 (1975). *Compare* United States v. Cody, 114 F.3d 772, 775-76 (8th Cir. 1997) (stopping interrogation immediately, waiting three hours, and providing fresh warnings indicative of scrupulous honor); West v. Johnson, 92 F.3d 1385, 1403 (5th Cir. 1996) (allowing passage of thirteen hours and fresh warnings scrupulously honored request), *cert. denied*, 520 U.S. 1242 (1997); United States v. Moreno-Flores, 33 F.3d 1164, 1170 (9th Cir. 1994) (finding scrupulous honor when officer asked off-hand question unrelated to investigation and, not regarding reminder of rights, suspect begins speaking about investigation); United States v. Evans, 917 F.2d 800, 804-05 (4th Cir. 1990) (holding officer mentioning to suspect what would happen at processing and before the magistrate was still honoring suspect's rights), *and* Jackson v. Dugger, 837 F.2d 1469, 1471-72 (11th Cir. 1988) (finding scrupulous honor in immediate termination, repeated issuance of fresh warnings during wait of six hours), *with* United States v. Tyler, 164 F.3d 150, 154-55 (3d Cir. 1998) (finding invocation of right followed by fresh warnings not scrupulous honor); United States v. Barone, 968 F.2d 1378, 1384-86 (1st Cir. 1992) (finding no scrupulous honor where police repeatedly spoke to suspect to induce change of mind and emphasized danger present to suspect if he failed to cooperate); Nelson v. Fulcomer, 911 F.2d 928, 939-41 (3d Cir. 1990) (finding short wait and no fresh warnings not scrupulous); Charles v. Smith, 894 F.2d 718, 725-26 (5th Cir. 1990) (finding no scrupulous honor in wait of several minutes followed by incriminating questions); *Kordenbrock*, 919 F.2d at 1097, 1100 (finding error in continuation of questioning after invocation of right); *Pena*, 897 F.2d at 1081-82 (finding violation where officer failed to clarify ambiguous request and informed suspect of recovered evidence), *and* Campaneria v. Reid, 891 F.2d 1014, 1021-22 (2d Cir. 1989) (telling suspect "now is the time" to make a statement despite clear invocation of right is coercive).

55. *See Mosley*, 423 U.S. at 97-98. The arrest paperwork and interrogation lasted approximately 20 minutes, and at no time did Mosley request to speak with counsel. *See id.* at 97.

56. *See id.* at 97-98 (noting circumstances surrounding interrogation). Mosley was initially arrested sometime in the early afternoon, and the second interrogation occurred at approximately six p.m. *See id.* The homicide occurred during a robbery that was not the subject of the initial interrogation. *See id.*

criminated himself.[57] Mosley was subsequently convicted of murder and sentenced to life imprisonment.[58]

The *Mosley* Court first noted that *Miranda* required that when a suspect invokes his or her right to silence, interrogation must cease.[59] When could interrogation begin again?[60] The Court specifically rejected three conceptions of when interrogation could resume: (1) never, under any circumstances; (2) at any time, but all further statements are inadmissible as coerced; or (3) following a momentary respite.[61] The intention of the *Miranda* Court was "to adopt 'fully effective means . . . to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored . . . .'"[62] The ability of the suspect to limit times, subjects and indeed the presence of interrogation, the Court held, cures the environment of its coercive taint.[63] If the suspect has control of the interrogation, then the issue must be dependent upon whether that control (*i.e.*, the invocation of the right to terminate questioning) was "scrupulously honored" as required by *Miranda*.[64]

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57. *See id.* (noting lack of objection). Mosley did, of course, object to the use of the statement at trial. *See id.* at 98-99.

58. *See id.* at 99 (noting conviction).

59. *See id.* at 100-01 (stating that invocation of right to silence mandates termination of interrogation (citing *Miranda v. Arizona*, 384 U.S. 436, 473-74 (1966)). The Court noted that this case did not cover invocations of the right to counsel, as Mosley never requested the aid of counsel. *See id.* at 101 n.7 (noting issue does not contain invocation of counsel).

60. *See Miranda*, 384 U.S. at 474 n.44 (noting that in presence of counsel invocation of right to silence may be followed by further questioning absent evidence of overbearing). Note that this did not pertain to Mosley, who neither requested nor was furnished counsel. *See Mosley*, 423 U.S. at 101 n.7 (noting no request).

61. *See Mosley*, 423 U.S. at 101-02 (suggesting possible interpretations of *Miranda*). Obviously none of these possibilities provides a workable solution. The first, for example, could result in a suspect, who invoked his right to silence 50 years prior, being immune from interrogation. The second would disallow spontaneous admissions of guilt. The third would allow police to continue with interrogation after the pause of a mere heartbeat. Note that no definition is offered for coerced. One commentator has opined that no sufficient definition for coercion can be derived. *See* Albert W. Alschuler, *Constraint and Confession*, 74 DENV. U. L. REV. 957, 957 (1997) (commenting that no legal definition exists for coercion). Professor Alschuler also contends that courts are likely to consider confessions obtained through offensive police practices as coerced regardless of the validity of the statement. *See id.* (citing WAYNE R. LAFAVE & JEROLD ISRAEL, CRIMINAL PROCEDURE § 6.2(b) at 295 (1985) (noting practice of excluding confessions obtained through offensive means)).

62. *Mosley*, 423 U.S. at 103 (quoting *Miranda*, 384 U.S. at 479).

63. *See id.* at 103-04 (observing that "[t]hrough the exercise of his option to terminate questioning he can control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation . . . [t]he requirement that law enforcement authorities must respect a person's exercise of that option counteracts the coercive pressures of the custodial setting").

64. *See id.* at 104 (noting test for statements made during re-interrogation following invocation of right to silence is whether police "scrupulously honored" right to silence (quoting *Miranda*, 384 U.S. at 479)). Note that *Mosley* requires police to scrupulously honor the request under *Miranda*, not under the Fifth

The Court did not, however, explain exactly what it meant by "scrupulously honored," instead it applied the test to the case at bar.[65] The application was fact based, and the Court noted that "the police here immediately ceased the interrogation, resumed questioning only after the passage of a significant period of time and the provision of a fresh set of warnings, and restricted the second interrogation to a crime that had not been a subject of the earlier interrogation."[66] Courts have since used these factors when determining what constitutes scrupulous honor.[67]

Amendment. *See id.* at 104 ("We therefore conclude that the admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his 'right to cut off questioning' was 'scrupulously honored.'").

65. *See id.* at 104-05 (applying scrupulous honor test to facts).

66. *Id.* at 106. The Court contrasted these facts with those of *Westover v. United States*, 384 U.S. 436 (1966), a companion case to *Miranda*. In *Westover*, the subject was arrested at approximately nine p.m. and questioned, without warnings, until noon the next day. *See Mosley* 423 U.S. at 106; *Westover*, 384 U.S. at 456-57. At noon, the FBI took over the interrogation, gave Westover his warnings and questioned him for two more hours until he incriminated himself. *See Mosley*, 423 U.S. at 106; *Westover*, 384 U.S. at 456-57. The Court in *Mosley* noted that the federal agents were recipients of the benefit of the earlier long interrogation by the local authorities, and the belated warnings had not purged that later interrogation of its inherently coercive nature. *See Mosley*, 423 U.S. at 106 (noting that *Westover* interrogation was coercive).

67. *Compare* United States v. Cody, 114 F.3d 772, 775-76 (8th Cir. 1997) (stopping interrogation immediately, waiting three hours, and providing fresh warnings indicative of scrupulous honor); West v. Johnson, 92 F.3d 1385, 1403 (5th Cir. 1996) (allowing passage of thirteen hours and fresh warnings scrupulously honored request), *cert. denied*, 520 U.S. 1242 (1997); United States v. Moreno-Flores, 33 F.3d 1164, 1170 (9th Cir. 1994) (finding scrupulous honor when officer asked off-hand question unrelated to investigation and, not regarding reminder of rights, suspect begins speaking about investigation); United States v. Evans, 917 F.2d 800, 804-05 (4th Cir. 1990) (holding officer mentioning to suspect what would happen at processing and before the magistrate was still honoring suspect's rights), *and* Jackson v. Dugger, 837 F.2d 1469, 1471-72 (11th Cir. 1988) (finding scrupulous honor in immediate termination, repeated issuance of fresh warnings during wait of six hours), *with* United States v. Tyler, 164 F.3d 150, 154-55 (3d Cir. 1998) (finding an invocation of right followed by fresh warnings not scrupulous honor); United States v. Barone, 968 F.2d 1378, 1384-86 (1st Cir. 1992) (finding no scrupulous honor where police repeatedly spoke to suspect to induce change of mind and emphasized danger present to suspect if he failed to cooperate); Nelson v. Fulcomer, 911 F.2d 928, 939-41 (3d Cir. 1990) (finding short wait and no fresh warnings not scrupulous); Charles v. Smith, 894 F.2d 718, 725-26 (5th Cir. 1990) (finding no scrupulous honor in wait of several minutes followed by incriminating questions); Kordenbrock v. Scroggy, 919 F.2d 1091, 1097, 1100 (6th Cir. 1990) (en banc) (finding error in continuation of questioning after invocation of right); United States v. Pena, 897 F.2d 1075, 1081-82 (11th Cir. 1990) (establishing violation where officer failed to clarify ambiguous request and informed suspect of recovered evidence), *and* Campaneria v. Reid, 891 F.2d 1014, 1021-22 (2d Cir. 1989) (telling suspect "now is the time" to make a statement for purposes of inducing waiver not scrupulous honor).

B. *The Circuit Split Over the Meaning of* Mosley

Different courts, however, have used different tests for determining what constitutes "scrupulous honor." The United States Court of Appeals for the First Circuit favors a test modeling the analysis used in *Miranda*.[68] The First Circuit also noted that at no time did the *Mosley* court suggest that the stringency of an admissibility test was dependent upon the amount of time that had passed since the invocation of the right by the defendant.[69] The court noted that *Mosley* creates prophylactic requirements:

> Based on the assumption that repeated rounds of questioning in the face of a decision to remain silent nearly always will undermine a suspect's will[, and therefore] a Fifth Amendment violation is presumed unless the law enforcement officials have followed specified procedures. In this setting, the prophylactic requirement is that the police "scrupulously honor" the "right to cut off questioning."[70]

Scrupulous honor, stated the court, involves a multiple factor review considering the time between interrogations, whether or not fresh warnings were provided, the scope of the subsequent interrogation and how forceful the police were in questioning the suspect after the invocation of the right to silence.[71]

There is some ambiguity in the United States Court of Appeals for the Second Circuit's handling of this issue.[72] Although the most recent case appeared to mandate fresh issuance of warnings, it then also considered other factors that reflect whether the right was scrupulously honored, and

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68. *See Barone*, 968 F.2d at 1383 (noting that Fifth Amendment violation is presumed unless law enforcement officers scrupulously honor invocation of right to silence). Also, as the United States Court of Appeals for the Third Circuit is the focus of this Casebrief, its decisions are discussed at length in the Analysis section, *supra* notes 98-152.

69. *See id.* (noting no difference in test stringency for various time periods since invocation of right). The court also rejected the view that the applicable standard was whether the revocation of the right was voluntary. *See id.*

70. *Id.* (quoting *Mosley*, 423 U.S. at 102) (emphasis omitted).

71. *See id.* (relating factors considered in analysis of interrogations subsequent to invocation of right to silence).

72. *Compare Campaneria*, 891 F.2d at 1021 ("Questioning can be resumed after fresh *Miranda* warnings are given and the right to remain silent is otherwise scrupulously honored, for example, by renewing the questioning only after the passage of a significant period of time and by limiting the renewed questioning to a different subject matter than the original interrogation."), *with* Wilson v. Henderson, 584 F.2d 1185, 1188 (2d Cir. 1978) ("We are not of the belief, however, that the crucial factor in determining a Fifth Amendment violation should be the length of time between questioning."), *and* United States v. Collins, 462 F.2d 792, 797 (2d Cir. 1972) ("So long as such [police requested] reconsideration is urged in a careful, noncoercive manner at not too great length and in the context that a defendant's assertion of his right not to speak will be honored, it does not violate the *Miranda* mandate.").

it did not explicitly overrule earlier precedent requiring merely that fresh warnings be given.[73]

The United States Court of Appeals for the Fourth Circuit has only heard one case dealing directly with this issue.[74] As such, its method of analysis cannot be examined beyond the limited facts that were at bar. It appears that the Fourth Circuit is following early Second Circuit precedent, holding that a police officer who immediately followed an assertion of the right to silence with a request to reconsider still scrupulously honored the suspect's invocation.[75]

The United States Court of Appeals for the Fifth Circuit appears to base its decisions primarily upon the time elapsed between the assertion of the right and the second interrogation.[76] It does acknowledge, however, that the analysis must be done on a case-by-case basis.[77]

The United States Court of Appeals for the Sixth Circuit has never explicitly stated the analysis it uses to determine whether the invocation of the right to silence has been scrupulously honored.[78] It is, however, clear that when police do not stop the interrogation and urge the suspect to continue speaking they do not scrupulously honor.[79] But when police leave the room for only a few minutes, return with a co-suspect, tell the suspect the co-suspect has implicated him or her in the crime and respond to the co-suspect's question "what should I do?" with a statement to tell the truth, the police have scrupulously honored the suspect's invocation.[80]

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73. *See Campaneria*, 891 F.2d at 1021 (noting threshold requirement of fresh warnings, and further factors to be considered, with goal of preventing police overbearing suspect's will); Anderson v. Smith, 751 F.2d 96, 102 (2d Cir. 1984) (noting that invocation of right to silence immediately followed by more questioning is not scrupulous honor); *Wilson*, 584 F.2d at 1188 (observing that time is not crucial element); *Collins*, 462 F.2d at 797 (allowing police to ask reconsideration of invocation of right under certain circumstances).

74. *See generally* United States v. Smith, 608 F.2d 1011 (4th Cir. 1979).

75. *See id.* at 1014 (holding assertion of right immediately followed by police comment that "it would be best to cooperate" still scrupulous honor) (citing *Collins*, 462 F.2d at 795).

76. *See* West v. Johnson, 92 F.3d 1385, 1403 (1996) (noting that passage of 13 hours between interrogations meets scrupulous honor requirement) (citing *Kelly v. Lynaugh*, 862 F.2d 1126, 1130 (5th Cir. 1988)).

77. *See* United States v. Alvarado-Saldivar, 62 F.3d 697, 699 (5th Cir. 1995) ("With no bright line test, courts must evaluate the facts of each case to determine if the resumption of police interrogation was consistent with scrupulous observance of the right to cut off questioning.") (citing *Wilcher v. Hargett*, 978 F.2d 872, 877 (5th Cir. 1992))).

78. *See generally* Kordenbrock v. Scroggy, 889 F.2d 69 (6th Cir. 1989), *vacated and reh'g granted*, 896 F.2d 1457 (6th Cir. 1990), *and reheard*, 991 F.2d 1091 (6th Cir. 1990) (en banc); Jovanovic v. Engle, No. 84-4012, 1986 WL 16829 (6th Cir. Apr. 25, 1986).

79. *See Kordenbrock*, 889 F.2d at 78 (holding that police urging suspect to continue speaking and not pausing interrogation did not scrupulously honor invocation of right).

80. *See* Jovanovic v. Engle, No. 84-4012, 1986 WL 16829, at *1 (finding that police behavior scrupulously honored request).

The United States Court of Appeals for the Seventh Circuit adopted an approach focusing on whether the police sought to undermine the resolve of the suspect.[81] The court also, however, analyzes the factors enumerated in *Mosley*.[82] The Seventh Circuit appears to have intended to force its district courts' attention to whether a statement was "'was obtained in a manner compatible with the requirements of the Constitution.'"[83] In so doing, the court found police had scrupulously honored a suspect's invocation of the right, even when the subsequent interrogations, unlike Mosley's, dealt with the same crime as the first.[84]

The United States Court of Appeals for the Eighth Circuit has determined that the appropriate question is whether law enforcement officers "persisted in 'repeated efforts to wear down the person's resistance' in order to change the person's version of the facts."[85] In its determinations, the court has enumerated three factors, named by the *Mosley* Court, that must be met before subsequent statements become admissible: "(1) there was an immediate cessation of questioning upon defendant's request; (2) a 'significant amount of time' had passed since the last session and a new set of [*Miranda*] warnings was given; and (3) the second interrogation involved inquiries concerning a separate crime."[86] The court has interpreted the third factor to allow both discussions of identical crimes in different locales or interrogations by officers of different precincts.[87]

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81. *See* United States v. Schwensow, 151 F.3d 650, 659 (7th Cir. 1998) (noting that standard should reflect intentions of police in conducting second interrogation).

82. *See* Michigan v. Mosley, 423 U.S. 96, 106 (1975) (listing factors to consider when analyzing whether police scrupulously honored suspect's invocation of right to silence).

83. *Schwensow*, 151 F.3d at 659 (quoting *Miller v. Fenton*, 474 U.S. 104, 112 (1985)).

84. *See id.* (noting that police questioning of suspect about same crime on multiple occasions acceptable) (citing *United States v. Andrade*, 135 F.3d 104, 106-07 (1st Cir. 1998); *Hatley v. Lockhart*, 990 F.2d 1070, 1074 (8th Cir. 1993); *United States v. Hsu*, 852 F.2d 407, 410 (9th Cir. 1988); *Jackson v. Dugger*, 837 F.2d 1469, 1471-72 (11th Cir. 1988); *United States v. Smith*, 608 F.2d 1011, 1014-15 (4th Cir. 1979); Wilson v. Henderson, 584 F.2d 1185, 1188-89 (2d Cir. 1978))).

85. United States v. McClinton, 982 F.2d 278, 282 (8th Cir. 1992) (quoting *Mosley*, 423 U.S. at 105-06).

86. United States v. House, 939 F.2d 659, 662 (8th Cir. 1991) (citing *Mosley*, 423 U.S. at 104-105); *see* United States v. Cody, 114 F.3d 772, 775 (8th Cir. 1997) (noting that police must "allow a 'significant amount of time' to pass before questioning begins again, re-advise the detainee of her *Miranda* rights, and limit the ensuing interrogation to questions regarding a separate crime not the subject of the first questioning session") (citing *House*, 939 F.2d at 662)). Although the Eighth Circuit has not quantified a "significant period of time", it considers periods as short as two hours acceptable. *See* Hatley v. Lockhart, 990 F.2d 1070, 1074 (8th Cir. 1993).

87. *See* United States v. Pugh, 25 F.3d 669, 673 (8th Cir. 1994) (noting discussion of drug trafficking in two different states qualifies as interrogation regarding separate crime); *McClinton*, 982 F.2d at 282 (holding that third factor is present where two interviews are conducted by officers from different jurisdictions); *cf. Hatley*, 990 F.2d at 1074 (stating that "a second interrogation is not rendered un-

The United States Court of Appeals for the Ninth Circuit has adopted a flexible standard in which the time between interrogations is not dispositive.[88] Curiously, the subject matter of the interrogation is not dispositive either.[89] Rather, the court devotes the bulk of its attention to a determination of the validity of the waiver prior to the second interrogation and, derivatively, the provision of a second set of warnings.[90]

The United States Court of Appeals for the Tenth Circuit appears to consider both the time between interrogations and the presence of a valid waiver of fresh warnings as illumed by the holding and reasoning in *Littlejohn v. Nelson.*[91] In *Littlejohn*, the court found that an invocation of the right to silence followed by termination of the interrogation until the next morning, a fresh set of warnings and a signed waiver constituted scrupulous honor.[92]

The United States Court of Appeals for the Eleventh Circuit has taken the position that, while the analysis is to be conducted on a case-by-case basis, the minimum requirement is either a significant passage of time between interrogations or a suspect-initiated conversation coupled with a knowing, intelligent and voluntary waiver of the asserted right to silence.[93] The passage of time can be between one and two hours and still constitute scrupulous honor.[94] There is also some evidence that the court considers

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constitutional simply because it involves the same subject matter discussed during the first interview").

88. *See Hsu*, 852 F.2d at 410 (noting that length of time between interrogations is relevant but not "talismanic" proof of scrupulous honor) (citing *United States v. Davis*, 527 F.2d 1110, 1111 (9th Cir. 1975))).

89. *See id.* (stating "we have noted on several occasions that an identity of subject matter in the first and second interrogations is not sufficient, in and of itself, to render the second interrogation unconstitutional") (citing *Grooms v. Keeney*, 826 F.2d 883, 886 (9th Cir. 1987); *United States v. Heldt*, 745 F.2d 1275, 1278 n.5 (9th Cir. 1984))).

90. *See id.* at 410 (noting that issuance of second set of warnings is most important factor); *see also* United States v. Soliz, 129 F.3d 499, 504 (9th Cir. 1997) (finding that failure to discontinue interrogation is not scrupulous honor); United States v. Pichay, No. 91-10571, 1993 WL 51199, at *2 (9th Cir. Feb. 26, 1993) (noting that questioning day after invocation, following fresh warnings, by officers of different agency, scrupulously honored suspect's invocation).

91. *See* Littlejohn v. Nelson, No. 92-3062, 1992 WL 372593, at *2 (10th Cir. Dec. 18, 1992) (noting scrupulous honor where police immediately terminate interrogation and did not re-interrogate until following morning, after fresh warnings and valid waiver).

92. *See id.* (same).

93. *See* Jacobs v. Singletary, 952 F.2d 1282, 1293 (11th Cir. 1992) (noting threshold requirement for case-by-case analysis to begin) (citing *Delap v. Dugger*, 890 F.2d 285, 290 (11th Cir. 1989); *Jackson v. Dugger*, 837 F.2d 1469, 1472 (11th Cir. 1988)); *see also* Christopher v. Florida, 824 F.2d 836, 840 (11th Cir. 1987) ("The determination of whether a suspect's right to cut off questioning was scrupulously honored requires a case-by-case analysis.").

94. *See Jacobs*, 952 F.2d at 1293 ("Law enforcement officials have been found to have scrupulously honored a suspect's right to terminate questioning in cases in which as little as one to two hours separated a suspect's invocation of her rights

the number of sessions of questioning in its totality of the circumstances equation.[95]

It does not appear the United States Court of Appeals for the District of Columbia Circuit has ever heard the issue. The closest issue reported holds that after a suspect invokes his or her right to silence, and engages the former interrogator in a casual conversation, a volunteered confession is admissible.[96] Because the conversation was suspect-initiated, of course, an analysis of whether police scrupulously honored the request is inappropriate.[97]

III. ANALYSIS

The United States Court of Appeals for the Third Circuit has recently spoken on the ramifications of the *Miranda* decision.[98] An understanding of the Third Circuit's position on what constitutes interrogation and what constitutes scrupulous honor are necessary for an understanding of the analysis used to determine the fate of derivative evidence.

A. *The Third Circuit's View of Scrupulous Honor*

In *Nelson v Fulcomer*,[99] the Third Circuit had cause to visit both the definition of custodial interrogation and the impact created by police impropriety regarding statements obtained through interrogation's use.[100] In *Nelson*, Terrence Moore confessed to participation in the rape and mur-

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and one subsequent interrogation.") (citing *United States v. Nash*, 910 F.2d 749, 752 (11th Cir. 1990))) (emphasis omitted).

95. *See id.* at 1294 (discussing interplay between rounds of questioning and length of time between rounds).

96. *See* United States v. Hackley, 636 F.2d 493, 498-99 (D.C. Cir. 1980) (noting that, after invocation of right, casual conversation that leads to confession admissible).

97. *See* Miranda v. Arizona, 384 U.S. 436, 479 (1966) (finding that to protect privilege against self-incrimination, police are required to honor scrupulously). It is clear that when a suspect initiates a conversation and the police have in no way attempted to overbear that suspect's will, they have scrupulously honored the request. *Cf.* Rhode Island v. Innis, 446 U.S. 291, 300-01 (1980) (noting application of *Miranda* to interrogation).

98. *See* United States v. Tyler, 164 F.3d 150, 156 (3d Cir. 1998) (discussing evidentiary procedures following violation of the *Miranda* decision); Nelson v. Fulcomer, 911 F.2d 928, 932 (3d Cir. 1990) (discussing requirements for scrupulous honor).

99. 911 F.2d 928 (1990).

100. *See id.* at 931 (noting several issues on appeal, including whether confrontation by another suspect constituted custodial interrogation and whether police scrupulously honored invocation of right to silence). The court also visited two other issues: whether the defendant in fact invoked his right to silence and whether the confrontation with the other suspect violated the defendant's Sixth Amendment right to counsel. *See id.* Both issues are outside the scope of this Casebrief.

der of a young woman.[101] In his confession, Moore testified that defendant, Bruce Nelson, had actually initiated both crimes.[102] Police then read Nelson his rights, and he invoked his right to silence.[103] After Moore confessed and the police asked him to tell Nelson what he had done, a confrontation ensued in which Nelson asked how much Moore had told the police.[104]

The court first defined what constituted a custodial interrogation.[105] The *Innis* decision made it clear that "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect" constitute an interrogation.[106]

The court found it important not only that police had contrived to confront Nelson with his alleged partner and instructed Moore to tell Nelson he had confessed, but also what may have been told to Nelson, by either police or Moore, before the incriminating statement was made.[107]

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101. *See id.* at 929. Apparently the defendant, Nelson, and Moore stole a van in order to enter a parking lot to commit another theft. *See id.* at 930. The victim walked into the garage and was forced into the van, where she was raped and murdered. *See id.*

102. *See id.* at 930. Moore testified that it was Nelson who initially accosted the victim, Nelson who forced her into the van, Nelson who initially raped her, Nelson who encouraged Moore to rape her as well and Nelson who killed her. *See id.* Interestingly enough, all fingerprints, hair and saliva samples from the crime scene matched Moore's characteristics and were inconsistent with Nelson's. *See id.*

103. *See id.* Although the Commonwealth initially contested that Nelson had invoked his right, the court found that "the Commonwealth essentially argues that we should reject an uncontradicted factual finding of the state court which the Commonwealth's own attorney unambiguously corroborated during the state trial proceedings." *Id.* at 932. In the record there was only one reference to Nelson's invocation, and it was by the Commonwealth's counsel. *See id.* at 931.

104. *See id.* at 930. It is unknown what, if anything, Nelson was told before he posed the incriminating question. *See id.* at 934.

105. *See id.* at 932 (noting that "[c]ustodial interrogation encompasses not only direct questioning by the police, but also its functional equivalent") (citing *Rhode Island v. Innis*, 446 U.S. 291, 300-01 (1980) (internal quotes omitted))). The court cited *Innis* and its rule that the "functional equivalent" of custodial interrogation could also be the subject of Fifth Amendment and *Miranda* violations, specifically noting that the police practices *Miranda* sought to abolish were not limited to direct questioning. *See Nelson*, 911 F.2d at 932-33 (citing *Innis*, 446 U.S. at 300-01). The court also discussed *Arizona v. Mauro* and its holding that allowing a suspect to speak with his wife and then using the conversation against the suspect was not the "kind of psychological ploy that properly could be treated as the functional equivalent of interrogation . . . ." 481 U.S. 520, 527 (1987). It should be noted that in *Mauro*, the wife insisted on speaking with the husband, and there was no indication the police used the conversation as a ploy to get Mauro in incriminate himself. *See id.* at 527-29 (holding Mauro was not interrogated).

106. *Nelson*, 911 F.2d at 933-34 (quoting *Innis*, 446 U.S. at 301) (internal quotation marks ommitted). The inquiry conducted by the Third Circuit here appears to involve the totality of the circumstances.

107. *See id.* at 934 (discussing factors to consider in determination of presence of *Innis* violation). The critical fact the court appeared to be missing was whether Nelson had been told Moore had confessed, or whether he simply assumed it. *See*

The court held that if Nelson had merely been confronted with Moore, that would not be "reasonably likely to elicit an incriminating response."[108] The court acknowledged that caselaw was unsettled on this point, with several courts, including two courts of appeals, holding that confrontation with an alleged partner was inherently coercive and infringed upon Fifth Amendment rights.[109] The court also stressed that the communication between Nelson and Moore took place in an environment palpably dominated by the police, in which it was to be expected that every word said would be communicated to the police.[110]

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id. The court found that "[c]onfronting a suspect with his alleged partner and informing him that his alleged partner has confessed is very likely to spark an incriminating response from a suspect if that suspect is in fact guilty." *Id.* The court noted that although Moore's instructions had also been to tell Nelson that Moore's confession had implicated him, its ruling would have been the same if the police had merely confronted Nelson with Moore and the knowledge of a confession without any implication of Nelson. *See id.*

108. *Id.* at 938. The court did point out that a confrontation between a suspect and his questioned partner, even without a confession, has coercive impact. *See id.* The court also confined its analysis to the assumption that "Nelson made his remark before being informed of the confession, and that Moore said and did nothing, other than enter Nelson's interrogation room, to provoke a response from Nelson." *Id.* The court's two plausible scenarios thus leave out the possibility that Moore entered the room, made inflammatory comments other than admission of a confession, and that after these comments Nelson made his inculpatory remark.

109. *See id.* at 935 (noting creation of circuit split). The court did, however, point out that the great majority of these cases were decided before *Innis* and that it doubted the continued vitality of the opinions. *See id.* at 936. In fact, the court noted that:

> We have found no post-*Innis* case in which a court has sanctioned confronting a suspect who has claimed his right to remain silent with his alleged partner and advising him at the same time of the existence of a confession by the partner. We think law enforcement agents should realize that this combination is particularly well calculated to produce incriminating remarks.

Id. at 936.

110. *See id.* at 938 (noting that police dominated environment and expected perception of communication to police). The court sought to distinguish the present facts from those in *Illinois v. Perkins*, in which an undercover agent posed as a prison inmate and was placed in the prisoners cell to elicit information. *See id.* at 937 (citing *Illinois v. Perkins*, 496 U.S. 292, 294-95 (1990)). Noting that *Miranda* protected prisoners in a police-dominated atmosphere, the *Perkins* Court held that a cellblock interrogation was not the same coercive environment. *See Perkins*, 496 U.S. at 296. The court also held that *Perkins* was a case of "misplaced trust in one . . . suppose[d] to be a fellow prisoner." *Id.* at 297. *Miranda* named two factors as contributory to a coercive environment: fear of reprisal for silence and false hope of clemency for confession. *See Nelson*, 911 F.2d at 938. As neither factor applies to a discussion between two supposed prisoners, the *Perkins* fact pattern avoids both factors and does not fall under *Miranda*'s protective web. *See Nelson*, 911 F.2d at 938 (noting *Miranda* inapplicable to *Perkins*). The *Nelson* court held that a police interrogation, followed by an invocation of the right to silence, followed immediately by a police announcement that an alleged partner had confessed and a confrontation with that partner, was not comparable to the facts in *Perkins*. *See id.* (noting police cannot avoid *Miranda* in this situation).

The court next examined the confrontation as a failure of the police to honor scrupulously Nelson's right to remain silent.[111] The court noted that the police did not wait a significant period of time, give Nelson fresh *Miranda* warnings, question regarding a different crime or use different police officers when they confronted Nelson with Moore.[112] Thus, the court held that if the confrontation with Moore was interrogation, police had failed to honor scrupulously Nelson's right to terminate the interrogation.[113]

B. *The Fate of Derivative Evidence Following a* Miranda *Violation in the Third Circuit*

Most recently in *United States v. Tyler*,[114] the Third Circuit clarified the analysis to be used in those cases where police officers fail to honor scrupulously a suspect's invocation of his or her right to silence.[115] In *Tyler*, Willie Tyler was tried for his role in the murder of a state witness in the drug trafficking trial of his brother, David Tyler.[116] Two months later, police arrested Willie Tyler for his role in the murder and issued his *Miranda* warnings, and Tyler stated he did not wish to make a statement.[117] Law enforcement officers then took Tyler to the station where further discussion culminated in law enforcement officers re-issuing *Miranda* warnings, and Tyler providing an incriminating statement.[118] Eleven days

111. *See Nelson*, 911 F.2d at 939 (examining claim of failure to honor scrupulously invocation of right to remain silent); *see also* Miranda v. Arizona, 384 U.S. 436, 478-79 (1966) (noting requirement that police honor scrupulously invocation of right).

112. *See Nelson*, 911 F.2d at 939-40 (noting no indicia of scrupulously honoring suspect's invocation of right to silence). Recall that the lead case on scrupulously honoring an invocation of the right to remain silent is *Michigan v. Mosley*, 423 U.S. 96 (1975), and that in *Mosley*, after the suspect had invoked his right to counsel, police waited several hours, had a different officer enter, gave a fresh set of *Miranda* warnings and discussed crimes other than those provoking the invocation of the right. *See id.* at 104. For a more detailed discussion of the facts and holding of *Mosley*, see *supra* notes 52-67 and accompanying text.

113. *See Nelson*, 911 F.2d at 940-41 (noting that under circumstances interrogation would fail to honor scrupulously suspect's rights). Hence, the issue of whether Nelson was informed of his alleged partner's confession again becomes critical because, if he was, then the confrontation was interrogation, and thus impermissible under *Mosley*. *See id.* at 938-41 (noting possible outcome on remand).

114. 164 F.3d 150 (3d Cir. 1998).

115. *See id.* at 151-59 (discussing various rights and standards implicated by custodial interrogation).

116. *See id.* at 151-52. The day before David Tyler's trial was to begin, he and his accomplices beat, stabbed and then shot a government witness. *See id.* The witness had previously testified against Tyler and several other individuals in a preliminary hearing. *See id.*

117. *See id.*.

118. *See id.* (noting statement introduced at trial). Regarding the discussion that led up to the incriminating statement, it is unclear what exactly was said, who exactly was present and exactly when the conversation took place. *See id.* One state trooper testified that he and three others were talking to Tyler around an

later, while Tyler was in custody at the county jail following his arraignment, he was again questioned by state troopers and again made incriminating statements.[119]

The United States District Court for the Middle District of Pennsylvania suppressed any statements Tyler may have made from the time he was brought to the interrogation room until the time he was re-issued his *Miranda* warnings.[120] The district court did not, however, find error in the state court's admittance of the inculpatory remark that followed the re-issue of Miranda warnings, as well as the remark made eleven days later, following Tyler's arraignment.[121]

The Third Circuit took issue with the district court's handling of these claims of *Miranda* violation.[122] The appellate court reiterated that

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hour before the incriminating statement was made, discussing hunting and other such things unrelated to the investigation. *See id.* Tyler then became emotional and stated that he did not know that "they were going to kill [her] . . . that he was there when it happened but he did not see [who] did the shooting." *Id.* at 153. At this point Tyler was re-issued his Miranda warnings and he revealed all he knew of the murder. *See id.* at 153-54. Another trooper's testimony, however, states that he and Tyler were the only people present, that Tyler began to cry, "and that the trooper told Tyler to 'tell the truth' when he began crying." *Id.* at 154. The second trooper also testified that after he was told to tell the truth Tyler began to speak, was re-issued his Miranda warnings, and then made the incriminating statements. *See id.* The court pointed out discrepancies between the testimony of the two state troopers present during the investigation. *See id.* As it related to the incriminating statement, the court found it did not matter which version of the facts was true, because in no version did the troopers scrupulously honor Tyler's invocation of his right to silence. *See id.* at 155 (noting in either version Tyler was told to "tell the truth").

119. *See id.* at 156 (noting further interrogation). Although the state troopers testified that Tyler initiated this conversation, the court was reluctant to accept this given the discrepancies in the prior testimony of these troopers about Tyler's earlier statements. *See id.* at 156 n.10, 158 (noting inquiry on remand must include who initiated interrogation).

120. *See id.* at 152. This would appear to cover the remarks made by Tyler that he did not know that the witness was to be killed, that Tyler was present and that Tyler did not see who shot the witness. *See id.* at 152-53 (noting statements made before re-issuance of *Miranda* warnings). The two inculpatory remarks used in trial against Tyler, however, were issued after Tyler was read his *Miranda* rights and again after a period of 11 days and were not the remarks which were later suppressed. *See id.* at 152.

121. *See id.* at 152, 156 (noting lack of error). The court noted that the main difference in the contents of these remarks appear to be that in the remark following the re-issue of *Miranda* warnings, Tyler indicated that his brother wished to kill the witness, where in the remark obtained days later, Tyler stated his brother wished only to scare her. *See id.* at 158. Although there may be no pragmatic difference between the two, the court left open the possibility that if the second remark was admissible, the admission of the first may not be harmless error. *See id.* at 158-59 (noting district court may have to decide this issue on remand).

122. *See id.* at 152 ("Although we agree that the district court erred in denying the suppression motion as to the [earlier] statement, we cannot, on the basis of this record, make a determination as to the [later] statement."). Although the court did not render judgment upon the admissibility of the later statement, instead remanding the issue to the district court for further consideration, it did

Miranda requires not only the issuance of basic warnings regarding constitutional rights, but also that police honor the invocation of those rights.[123] Given that Tyler was brought into a small room, containing a timeline of the murder investigation as well as photographs of the *corpus delecti*, was left in that room for hours, that at least one, possibly as many as four, state troopers began talking to him and that only after he had began to speak were his rights again delineated, the court was unable to hold that Tyler's right to silence was scrupulously honored.[124] Although the court did not explicitly state the test used to determine whether the police scrupulously honored an invocation of the right, the citation to *Mosely* and the listing of different dimensions of the interrogation strongly imply that a totality of the circumstances test was used, in which the lengthy conversation prior to re-issuance of the *Miranda* warnings and physical conditions of the interrogation room weighed prominently.[125]

The Third Circuit next turned its attention to the later statement, procured after Tyler had been arraigned but before counsel had been ap-

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express displeasure at the methodology used by the district court in concluding that the statement was indeed admissible. *See id.* at 157, 159 (noting district court did not make adequate inquiry to support its finding). Specifically, the district court held that "'[T]here is nothing in the record to support an argument that Defendant's waiver was not knowingly made.'" *Id.* at 156 (quoting district court opinion) (editorial alterations in original). The Third Circuit stated that it appears the district court had thus required Tyler to prove that his statement was not made pursuant to a valid *Miranda* waiver. *See id.* The burden, of course, runs the other way. *See id.*

123. *See* Miranda v. Arizona, 384 U.S. 436, 479 (1966) ("[U]nless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored, [certain warnings] are required. . . ."); *see also* Michigan v. Mosley, 423 U.S. 96, 104 (1975) ("We . . . conclude that the admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his 'right to cut off questioning' was 'scrupulously honored.'").

124. *See Tyler*, 164 F.3d at 153-55 (discussing nature of interrogation and noting failure of police to honor scrupulously invocation of right against self incrimination). Notice that several of these factors have been present separately and that courts have found that police scrupulously honored the right. For a general discussion of cases implicating the scrupulously honor test, see *supra* note 67 and accompanying text. The district court held that because Tyler had again been issued his *Miranda* warnings, any coercive taint from the circumstances had been alleviated. *See Tyler*, 164 F.3d at 154 (noting district court opinion). The Third Circuit replied:

> [I]t is clear that police can not, as if by alchemy, negate Tyler's invocation of his right to remain silent by a mantra-like recitation of *Miranda* warnings. The warnings are not intended to be a mere ritual, the exercise of which guarantees the admissibility of any statement that is obtained in a custodial interrogation regardless of the circumstances. . . . Here the [actions of the troopers] after Tyler had invoked his *Miranda* rights is the antithesis of scrupulously honoring his right to remain silent.

Id. at 155.

125. *See id.* at 153-55 (citing *Michigan v. Mosley*, 423 U.S. 96 (1975)).

pointed.[126] Acknowledging that *Tyler* presented a case of first impression, the court set out to determine the appropriate analysis when police failure to honor scrupulously a suspect's invocation of the right to silence leads to further evidence.[127] The Court stated that the analysis "used to resolve allegations that statements were tainted by a prior violation of the Fourth and/or Fifth Amendment should also guide, though not control, our inquiry. . . ."[128] Judge McKee then analyzed the later statement under the theories that it was a waiver of the right to counsel and that it was inadmissible as the fruit of a prior constitutional violation.[129] The court noted that the mere recitation of fresh *Miranda* warnings was necessary, but not sufficient, to break the causal link between the prior violation of Tyler's

126. *See id.* at 156 (discussing admissibility of later statement). Although counsel had yet to be appointed, the court correctly pointed out that Tyler's Sixth Amendment right had been activated by the arraignment. *See id.* (noting right of counsel had attached).

127. *See id.* (noting that "[t]his case raises an issue that we have not yet addressed in the context in which Tyler raises it"). One of Tyler's arguments was that his later statement should be suppressed as the product of earlier violations of his Fifth Amendment right. *See id.*

128. *Id.* The court also noted that Tyler had presented his claim under *Mosley*. *See id.* at 155 n.8. The court also appears to be implicating the "fruit of the poisonous tree" doctrine as guidance for its Fifth Amendment jurisprudence. *See id.* at 155-56 n.8, 156 (noting assertion of constitutional violation and section titled "Fruit of the Poisonous Tree"). The court also quoted *United States v. Bayer*:

> After an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good. In such a case, a later confession may always be looked upon as a fruit of the first.

Id. at 156 (quoting *United States v. Bayer*, 331 U.S. 532, 540 (1947)).

Nevertheless, the court does not follow *Bayer* far enough. *Bayer* immediately goes on to say that "[T]his Court has never gone so far as to hold that making a confession under circumstances which preclude its use, perpetually disables the confessor from making a usable one after those conditions have been removed." *Bayer*, 331 U.S. at 540.

Note also that *Elstad* specifically rejects application of the fruit of the poisonous tree doctrine to violations of *Miranda*. *See* Oregon v. Elstad, 470 U.S. 298, 308 (1985) (holding that fruit of poisonous tree doctrine is inapplicable to *Miranda* violations). *Elstad*, however, dealt with a case of technical violation of *Miranda* where there was no challenge to the assertion that the actual statement was uncoerced and voluntary. *See id.* Thus, the *Elstad* decision does not specifically forbid the use of the "fruit of the poisonous tree" doctrine when the violation is not of *Miranda*, but of the Fifth Amendment proper.

129. *See Tyler*, 164 F.3d at 155 n.8, 156 (discussing multiple paths of analysis available to court). The court rapidly dealt with the waiver analysis because the primary contention was uncertainty over the standard imposed by the district court. *See id.* (noting district court's reversal of burden of proof). To the court, it appeared from the record that the district court required Tyler prove that his waiver was not knowing and voluntary. *See id.* The circuit court correctly pointed out that the correct standard required the prosecution prove the waiver was knowing and voluntary. *See id.*

Fifth Amendment rights and the later prison statement.[130] The court went on to list several factors, explicitly not an exclusive list, that determine where and if a causal break is created: (1) the passage of time between the two statements, (2) the subject matter of the second interrogation and (3) whether the interrogators are coercive or overbearing.[131] It is interesting to note that the court linked violations of the Fourth and Fifth Amendments and discussed this later statement in terms of being the fruit of a prior constitutional violation and not as the fruit of a prior *Miranda* violation.[132]

The court then held that the later statement could only be admitted if the police had scrupulously honored Tyler's invocation of his right to silence when he was first arrested, and the court tied police exploitation of earlier illegal statements into this test of scrupulous honor.[133] Thus, instead of using the "fruit of the poisonous tree" to suppress the statement initially, the court required a similar "fruit" analysis be conducted as a portion of the larger scrupulous honor analysis.[134]

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130. *See id.* at 157 (noting recitation of *Miranda* warnings does not by itself purge statement of taint); *see also* Brown v. Illinois, 422 U.S. 590, 602 (1975) ("If *Miranda* warnings, by themselves, were held to attenuate the taint of an unconstitutional arrest, regardless of how wanton and purposeful the . . . violation, the effect of the exclusionary rule would be substantially diluted.").

131. *See Tyler*, 164 F.3d at 158 (noting considerations in judicial determination of break in causal chain between earlier illegal statements and subsequent statements). The court borrowed heavily from persuasive authority of the Second Circuit, noting the Second Circuit reasoned that "[t]he purpose of [the *Miranda*] rule is to counter the inherently coercive effects of custodial interrogations." *Id.* at 157 (quoting *Campaneria v. Reid*, 891 F.2d 1014, 1021 (1989)). The court also reiterated *Elstad*'s rejection of the fruit of the poisonous tree doctrine as applied to *Miranda* violations. *See id.* at 158 (discussing *Elstad*). This reference is confusing, however, because *Elstad* applied only to technical violations of *Miranda*, and not to violations of the Fifth Amendment proper. *See Elstad*, 470 U.S. at 312 ("There is a vast difference between the direct consequences flowing from coercion of a confession . . . and the uncertain consequences of disclosure . . . freely given in response to an unwarned but noncoercive question. . . .").

132. *See Tyler*, 164 F.3d at 155 ("We believe the analysis that has been used to resolve allegations that statements were tainted by a prior violation of the Fourth and/or Fifth Amendment should also guide, though not control, our inquiry into the failure to scrupulously honor Tyler's right to remain silent . . . .").

133. *See id.* at 158 ("[T]he district court must first determine if the conduct of the police in obtaining the [later] statement was consistent with their duty to scrupulously honor Tyler's prior assertion of his right to remain silent."). The court required the district court to consider who initiated the conversation that resulted in the later incriminating statements, the length of time between the earlier and later interrogations, the extent to which the same police officers conducted both interrogations, the manner in which the later interrogation was conducted and anything else the district court thought would help determine "whether police exploited their prior disregard of Tyler's right to remain silent" when they obtained the later statement. *Id.* The court also noted that "the inquiry must include consideration of the extent to which the [later] statement was the result of the prior misconduct that resulted in the [earlier] statement." *Id.*

134. *See id.* (discussing factors considered in scrupulous honor analysis). Notice, however, that because *Elstad* did not directly apply to the case at bar, the court

Although such analytical jockeying may remove the "poisonous tree" analysis from *Elstad*, such measures are only necessary if a duty to honor scrupulously is not contained within the Fifth Amendment proper.[135] The distinction between scrupulous honor as an incidence of *Miranda*'s prophylactic rules and scrupulous honor as a Fifth Amendment right becomes crucial: if the failure merely violates the prophylactic rules, then *Elstad* clearly prohibits the use of the "poisonous tree" doctrine with any statements stemming from the failure.[136] The position that a lack of scrupulous honor is a violation of the Fifth Amendment, not of *Miranda*, has some support within the jurisprudence of the Supreme Court, and more in public policy. The distinction between violating a suspect's Fifth Amendment rights and violating the prophylactic rules set forth in *Miranda* is the distinction that takes this holding outside of *Elstad*.[137]

A view of scrupulous honor as a substantive right guaranteed by the Fifth Amendment has some modest support in precedent.[138] The *Miranda* decision itself differentiates between the procedural safeguards to be observed and the right that refusal to speak be scrupulously honored.[139] The *Elstad* Court stated that the Fifth Amendment prevented prosecutors from using compelled testimony in their cases-in-chief.[140] Thus, it would appear that procurement of testimonial evidence through

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was free to apply *Won Sun* directly to the later statement. For a discussion of possible implications of this approach, see *infra* notes 138-39 and accompanying text.

135. *See* Oregon v. Elstad, 470 U.S. 298, 300, 302 (1985) (discussing use of statements obtained in violation of *Miranda* and remaining silent on statements made following violation of Fifth Amendment).

136. *See id.* at 318 ("We hold today that a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite Miranda warnings.").

137. *See id.* (discussing breadth of holding). The holding explicitly limits itself to uncoerced statements, whereas a failure to honor scrupulously the invocation is inherently coercive. *See* Michigan v. Mosley, 423 U.S. 96, 104 (1975) ("The requirement that law enforcement authorities must respect a person's exercise of that option counteracts the coercive pressures of the custodial setting."); Miranda v. Arizona, 384 U.S. 436, 474 (1966) ("Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked.").

138. *See, e.g., Miranda*, 384 U.S. at 478-79 (noting requirement of honoring right to silence).

139. *See id.* ("Procedural safeguards must be employed to protect the privilege . . . notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored . . . ."). The formation of the sentence strongly suggests that the assurance of scrupulous honor is not itself one of the procedural safeguards. The Court also noted that "[w]ithout the right to cut off questioning, the setting of in custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked." *Id.* at 474. It is obvious that the right to cut off questioning is meaningless without assurance that law enforcement officials will honor its invocation.

140. *See Elstad*, 470 U.S. at 306-07 (noting scope of Fifth Amendment). Recall that the only compulsion of which the Fifth Amendment is cognizant is that provided by the state. *See, e.g., id.* at 304-05 (noting Fifth Amendment's only concerned with state coercion); California v. Beheler, 463 U.S. 1121, 1125 & n.3

state coercion is the evil the privilege against self-incrimination seeks to cure.[141] A failure to honor scrupulously a suspect's attempt to avoid coercive pressure must then itself be a violation of that prohibition against coercion.

There is also some argument that the requirement that police officers scrupulously honor an invocation of the right to silence is but another procedural safeguard mandated by *Miranda*.[142] The *Mosley* Court appears to portray the right to terminate an interrogation as a safeguard against violation of the right against self-incrimination.[143] Perhaps the most relevant precedent against the consideration of scrupulous honor as a Fifth Amendment right is contained in *Mosley* itself, which strongly implies that the scrupulous honor requirement is merely a portion of the *Miranda* prophylactic rules.[144] If this is the case, then it is rather odd to propose a constitutional right to honor scrupulously a procedural safeguard that is not itself a constitutional right.

Public policy strongly supports the acknowledgement of the scrupulous honor requirement as a right under the Fifth Amendment.[145] First, as a protection of individual liberty, it is clear that the Fifth Amendment would prohibit coercion of self-incriminating testimony.[146] That coercion naturally extends to the suspect's ability to control the course of the interrogation through its termination.[147] Thus, it would appear to follow that the suspect has a constitutional right that the government not actively interfere with the invocation of the right to silence by its further interrogation. Interestingly, at least one commentator has noted that the United States Supreme Court's relegation of the *Miranda* rights to procedural

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(1983) (per curiam) (same); Rhode Island v. Innis, 446 U.S. 291, 303 & n.10 (1980) (same); Oregon v. Mathiason, 429 U.S. 492 (1977) (same).

141. *See* Greenwood & Brown, *supra* note 48, at 1318-19 (noting that Fifth Amendment protects against compulsion or coercion).

142. *See* Michigan v. Mosley, 423 U.S. 96, 103-04 (1975) ("The critical safeguard identified in the passage at issue is a person's 'right to cut off questioning.'") (quoting *Miranda*, 384 U.S. at 474)).

143. *See id.* (noting right of termination as procedural safeguard mandated by *Miranda*).

144. *See id.* at 102-03. There, the Court succinctly stated: "We . . . conclude that the admissibility of statements obtained after the person in custody has decided to remain silent depends under Miranda on whether his 'right to cut off questioning' was 'scrupulously honored.'" *Id.* at 104 (emphasis in original text).

145. *Cf.* Greenwood & Brown, *supra* note 48, at 1320 ("The Fifth Amendment is only violated when the inherently coercive environment created by custodial interrogation actually functions to compel a confession.").

146. *See id.* (noting Fifth Amendment when coercive environment compels confession).

147. *See Mosley*, 423 U.S. at 103-04 (noting primary protection offered by *Miranda* is suspect's ability to end questioning); *Miranda*, 384 U.S. at 474 (noting primary protection of suspect is ability to terminate interrogation).

rules and not constitutional rights may have encouraged some law enforcement officers to violate *Miranda* intentionally.[148]

The public also has an interest in truthful testimony in its courts of law.[149] To some extent, following a failure to honor scrupulously an invocation of the right to silence, some defendants will lie in order to appease the police and end the interrogation.[150]

There are also public policy arguments against the view of scrupulous honor as a constitutional requirement.[151] Public safety and the interest in seeing criminals held responsible for their actions are both served when there are more convictions.[152] To the extent then that any increase in convictions obtained represent convictions of persons who actually committed the crimes in question, public safety and retribution for crime are both served.

IV. CONCLUSION

It would appear then that the Third Circuit is not holding *Mosley*'s scrupulous honor requirement up as a constitutional right, but as a procedural safeguard.[153] The Third Circuit also appears to consider in its scrupulous honor jurisprudence a factor that "must include consideration of the extent to which [a later] statement was the result of the prior misconduct that resulted in [an earlier] statement."[154] Such a position quite possibly brings it squarely against *Elstad*'s prohibition against the application of the "fruit of the poisonous tree" doctrine to violations of prophylactic rules.[155] It is, however, possible to distinguish *Elstad* and *Tyler* on the grounds that the former dealt with testimonial evidence obtained as a result of the procedural violation of *Miranda*, whereas the latter deals with testimonial evidence obtained as a result of violation of *Mosley*.[156]

148. *See* Crawford, *supra* note 50, at 28-29 (noting view of *Miranda* rights as procedural may have influenced some law enforcement officers to violate them intentionally).

149. *See* Athanas, *supra* note 1, at 711 (noting unreliability of confessions made to end coercion).

150. *Cf. id.* at 712 (noting re-establishment of coercive atmosphere following equivocal request for attorney). Theoretically, the same coercive atmosphere that appears when a suspect's request for an attorney is ignored as "equivocal" exists when police ignore an invocation of the right to silence.

151. *See id.* at 675 (noting public interest favors effective law enforcement).

152. *Cf. id.* (noting need for effective law enforcement).

153. *See* United States v. Tyler, 164 F.3d 150, 154-55 (3d Cir. 1998) (discussing scrupulous honor requirement as violation of *Miranda* and *Mosley* (citing *Michigan v. Mosley*, 423 U.S. 96 (1975); *Miranda v. Arizona*, 384 U.S. 436 (1966)).

154. *Id.* at 158.

155. *See* Oregon v. Elstad, 470 U.S. 298, 306-07 (1985) (noting "fruit of the poisonous tree" doctrine inapplicable to violations of *Miranda* prophylactic rule). For a further discussion of the implications of the *Elstad* decision, see *supra* notes 41-51 and accompanying text.

156. *See Tyler*, 164 F.3d at 155 (noting Tyler's right to silence was not honored scrupulously as required by *Mosley*).

Drawing that distinction certainly does not conclude the matter. *Elstad* is quite clear that the "fruit of the poisonous tree" applies only to constitutional violations, and a violation of *Mosley* is not necessarily a violation of the Constitution.[157] One has to go further and assert that the Fifth Amendment is concerned with prohibiting the government from coercing citizens into providing testamentary evidence that will later be used against them.[158] To that premise, add *Mosley*'s admonition that failure to honor scrupulously a request for termination of interrogation constitutes coercion.[159] Then it is possible to combine the concept of the right to freedom from state coercion with the view that failure to honor the request to terminate an interrogation is coercive. The result must be that a failure to honor scrupulously the invocation is a violation of the Fifth Amendment. If that conclusion is accepted, then *Elstad* itself requires the "poisonous tree" to bloom again in the Fifth Amendment.

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157. *See Elstad*, 470 U.S. at 304 (noting exclusionary rule applies only to constitutional errors).

158. *See* Athanas, *supra* note 1, at 675 (noting premise behind *Miranda* is that privilege against self-incrimination is fundamental right and that state coercion is violation of that right).

159. *See* Michigan v. Mosley, 423 U.S. 423, 103-06 (1975) (stating conditions where invocation of privilege to stop questioning is not honored).